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No. 91-14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NORTHERN NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RESPONDENT INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

JOHN H. CHEATHAM, III*
JEAN E. SONNEMAN
555 13th Street, N.W.
Suite 300 West
Washington, D.C. 20004
(202) 626-3200

Attorneys for Interstate Natural Gas Association of America

**Counsel of Record*

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BRIEF OF RESPONDENT INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

The Interstate Natural Gas Association of America ("INGAA") respectfully submits its Brief in support of Petitioner in this case. INGAA was a party in the court proceeding below.

STATEMENT OF INTEREST

INGAA is a non-profit national trade association representing virtually all of the major interstate natural gas transmission companies operating in the United States. The companies account for over 90 percent of all natural gas transported and sold for resale in interstate commerce. INGAA's members also include major Canadian interprovincial pipelines subject to regulation by the National Energy Board of Canada. INGAA's U.S. members are regulated by the Federal Energy Regulatory Commission ("Commission") under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717w, and to a lesser extent, under the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301-3432.[1]

SUMMARY OF ARGUMENT

This case involves orders of the Commission which, for the first time since the Natural Gas Act was enacted in 1938, assert jurisdiction over the gathering

[1] INGAA adopts Petitioner's Statement of the Case and supports the arguments in support thereof.

activities of interstate pipelines notwithstanding the specific exclusion of gathering from the provisions of the NGA and in complete disregard of the numerous decisions of this Court that gathering is beyond the Commission's statutory reach. In upholding the Commission's orders, the court below disregarded the express terms of the NGA, the legislative history of the NGA, the decisions of this Court and a recent decision of the Court of Appeals for the Tenth Circuit. Section 1(b) of the NGA plainly states that its provisions shall not apply to "the production or gathering of natural gas." Instead,Congress left such regulation to the individual states, as this Court has often recognized. The decision of the court below is not supported by law and contradicts the intent of Congress to place gathering rates and facilities beyond the Commission's authority.

As a matter of fundamental agency jurisdiction, this case is of major importance to the natural gas industry and the millions of consumers it serves. Billions of dollars have been invested in gathering facilities in accordance with the long-standing belief that such facilities were excluded from federal regulation. If left standing, the decision below would severely impact on the ability of interstate pipelines to compete on equal terms with others who perform the same function but are deemed to be excluded from federal regulation. This negation of the plain meaning of Section 1(b) is completely unprecedented, contrary to Congressional intent, and an encroachment on the power of Congress to determine the scope of federal regulation of natural-gas companies. The issue raised by the court below has not previously been before the Supreme Court and a decision by this Court is

imperative to resolve this important question of statutory interpretation and public policy.

REASONS FOR GRANTING THE WRIT

ARGUMENT

I. THE OPINION BELOW CONTRADICTS CLEAR CONGRESSIONAL INTENT, AS EXPRESSED IN THE EXPLICIT LANGUAGE AND LEGISLATIVE HISTORY OF THE STATUTE, AND FIFTY YEARS OF PRECEDENT.

This case brings to the Supreme Court, a question of interpretation of the scope of the Federal Energy Regulatory Commission's powers under Section 1(b) of the NGA, 15 U.S.C. § 717(b). Section 1(b) is no stranger to this Court. In a long line of cases from *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), to *Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493 (1989), this Court has been called upon to interpret the meaning and scope of Section 1(b).

The court below, however, does not rely on the explicit language of Section 1(b) ("the Natural Gas Act's basic grant of jurisdiction"[2]) and the legislative history of the NGA. Instead, it relies on other provisions of the NGA, *viz.* Sections 4 and 5, 15 U.S.C. §§ 717c and 717d, as negating the gathering exclusion of Section 1(b) and creating for the Commission the authority to assert jurisdiction over the gathering rates of interstate pipelines. Such action is directly

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[2] *American Gas Ass'n v. Federal Energy Regulatory Comm'n*, 912 F.2d 1496, 1506 (D.C. Cir. 1990), *cert. denied sub nom. City of Willcox v. Federal Energy Regulatory Comm'n*, 111 S. Ct. 957 (1991).

contrary to the statute itself and the decisions of this Court, and is unsupportable under any reasoned interpretation of the powers given the Commission by Congress.

Congressional intent to grant the Commission jurisdiction over specific aspects of the natural gas industry is explicitly stated:

> The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale. . . .

NGA Section 1(b), 15 U.S.C. § 717(b). Similarly explicit is Congress' intent to withhold jurisdiction from certain other aspects of the natural gas industry, such as gathering:

> The provisions of this Act . . . shall not apply . . . to the production or gathering of natural gas.

Id. Thus, as this Court has explained, Section 1(b):

> determines the Act's coverage and does so in light of the situation existing at the time. Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale;

> and (3) natural gas companies engaged in such transportation or sale.

Panhandle Eastern Pipe Line Co. v. Public Service Comm'n, 332 U.S. 507, 516 (1947).

Since 1938, when the NGA was enacted, the explicit language of Section 1(b) has excluded gathering activities from the Commission's jurisdiction. In case after case involving the extent of Commission jurisdiction, this Court has considered the explicit language of Section 1(b) in the context of the legislative history as to Congress' intent. For example, in *Federal Power Comm'n v. Panhandle Eastern Pipeline Co.*, 337 U.S. 498, 502-16 (1949), this Court explored at great length the legislative history of the NGA, and concluded that the transfer of gas leases was outside the scope of the Commission's jurisdiction because of Section 1(b)'s exclusion of "the production or gathering of natural gas."

Without reciting again each facet of the legislative history that applies, it is important to emphasize that the intended scope of Section 1(b) on the specific point at issue here was addressed in the testimony of Dozier A. DeVane, the Solicitor of the Federal Power Commission, who was requested by the House Committee on Interstate and Foreign Commerce to "explain the provisions of the bill:"

> The bill makes no attempt to regulate the production or gathering facilities of a natural gas company, this function being purely local in character, nor is any attempt made to exercise control over distribution facilities.

Hearing Before a Subcommittee of the Committee on Interstate and Foreign Commerce on H.R. 11662 to

Regulate the Transportation and Sale of Natural Gas in Interstate Commerce and for Other Purposes, 74th Cong., 2d Sess. 17 (1936) (Statement of Dozier A. DeVane, Solicitor, Federal Power Commission). In an exchange with the ranking minority member of the House Commerce Committee, Mr. DeVane stated:

> MR. DeVANE: Now, section 1(b) also provides that the Commission shall have no jurisdiction over the gathering or gathering rates for natural gas.
>
> MR. COOPER: What do you mean by gathering rates?
>
> MR. DeVANE: The rates that are paid in the gathering field, Mr. Cooper.
>
> MR. COOPER: All right.

Id. at 28.

The bill that was discussed in the above statement and exchange was not reported out of Committee, but another bill which contained the "production or gathering" exemption was subsequently approved. In the report accompanying that bill, the Committee stated that production, gathering, and local distribution:

> could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill.

H.R. Rep. No. 709, 77th Cong., 1st Sess. 3 (April 28, 1937). H.R. 6586, the bill which is addressed in the above statement, passed without amendment in the House, where its floor manager flatly stated, "The bill does not apply to the production and gathering of gas." 81 Cong. Rec. H6721 (daily ed. July 1, 1937) (statement of Rep. Lea). The same bill was eventually passed by both the House and the Senate, with amendments not pertinent here, and without Senate Committee or floor debates on the matters of gathering and gathering rates.[3]

This Court has consistently recognized that the legislative history of the NGA demonstrates an intent on the part of Congress to complement, not supplant, the authority of the states over production and gathering (in the state of production) and over local distribution (in the state of consumption). As this Court has explained:

> the Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution. The jurisdiction of the Federal Power Commission was to complement that of the state regulatory bodies.

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[3] *See* S. Rep. No. 1162, 75th Cong., 1st Sess. (Aug. 11, 1937); 81 Cong. Rec. S9312 (daily ed. Aug. 19, 1937); 83 Cong. Rec. S8347, S9130, S9146, H9502-03, 75th Cong., 1st Sess. (June 1937).

Panhandle Eastern, supra, 337 U.S. at 502-03 (footnotes omitted). *See also Federal Power Comm'n v. Southern California Edison Co.*, 376 U.S. 205, 211-14 (1964); *Public Utilities Comm'n v. United Fuel Gas Co.*, 317 U.S. 456, 467 (1943) (summarizing the legislative history of the split between federal and state jurisdiction under the NGA and the Federal Power Act).

The explicit language of Section 1(b), when considered together with the legislative history of the NGA, leaves no room for doubt in this case. *See Northwest Central, supra*, 489 U.S. at 510-11; *Federal Energy Regulatory Comm'n v. Martin Exploration Management Co.*, 486 U.S. 204, 209 (1988) (quoting *Bethesda Hospital Ass'n. v. Bowen*, 485 U.S. 399, 403 (1988) ("The plain meaning of the statute decides the issue presented.")).

Moreover, prior to this time, the Commission has consistently ruled in other proceedings that gas gathering activities are not within its power to control and, indeed, in several recent proceedings has rejected on jurisdictional grounds tariff filings of gathering companies and producers covering gathering rates. *See, e.g., Farmland Industries, Inc.*, 23 F.E.R.C. ¶ 61,063 (1983); *Locust Ridge Gas Co.*, 37 F.E.R.C. ¶ 61,295 (1986); *Shell Gas Pipe Line Co.*, 41 F.E.R.C. ¶ 61,032 (1987). While not controlling, it is nevertheless significant that after fifty years of administration of the NGA, the Commission now seeks to control an area that heretofore it considered beyond its reach. In *Panhandle Eastern, supra*, this Court noted the significance of such a failure to act after ten years of Commission administration of the NGA:

> Thus for over ten years the Commission has never claimed the right to regulate dealings in gas acreage. Failure to use such power for so long a time indicates to us that the Commission did not believe the power existed.

337 U.S. at 513 (footnote omitted).

II. THE "THEORY" UNDERLYING THE DECISION OF THE COURT BELOW HAS NO LEGAL FOUNDATION.

The "theory" of the court below is that the Commission, irrespective of Section 1(b), may regulate rates charged by pipelines for gathering services since such services are ostensibly performed "*in connection with* jurisdictional interstate transportation." (App. 3a) (emphasis in original). Key to the court's rationale are the phrases "for or in connection with" in Section 4(a), 15 U.S.C. 717c(a), and "in connection with" in Section 5(a), 15 U.S.C. 717d(a).[4] The court relied on these phrases as giving the Commission "explicit" authority to regulate interstate pipeline gathering rates. (App. 21a). This reliance is misplaced and its premise is flawed.

To start with, as noted previously, Section 1(b) states plainly that "[t]he provisions of this Act . . . shall not apply to . . . gathering of natural gas." 15 U.S.C. § 717(b). Such exclusion plainly applies to *all* provisions of the NGA, including Sections 4 and 5. Second, the phrase "in connection with" cannot be taken out of context. The court below failed to give effect to the phrase of which the words "in connection with" are a part. Each time Congress used that

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[4] The provisions of Sections 4 and 5 are set forth in full in App. 62a-64a, and 65a, respectively.

phrase in Sections 4 and 5 of the NGA, it explicitly confined the Commission's authority to activities of natural-gas companies which are "subject to the jurisdiction of the Commission." Therefore, the phrase "in connection with" is limited solely to the activities to which it relates, *viz.* "transportation or sale of natural gas *subject to the jurisdiction of the Commission.*" 15 U.S.C. §§ 717c(a), 717d(a) (emphasis added). The full meaning of Sections 4 and 5 thus reinforces and is in complete agreement with Section 1(b). Gathering is neither a "sale" of natural gas "subject to the jurisdiction of the Commission" nor "transportation" in interstate commerce "subject to the jurisdiction of the Commission." Gathering is an activity which Congress specifically elected to exclude from the jurisdictional confines of the NGA.

The lack of a legal foundation for the Sections 4 and 5 "theory" is also evident in the lower court's claim that Commission jurisdiction extends over gathering "rates," but not gathering "facilities." (App. 22a). Such selective extension of jurisdiction is contrary to Section 4(b), which draws no distinction between jurisdiction over "rates" as opposed to "facilities." In Section 4(b), both "rates" and "facilities" are treated consistently, *i.e.*, "with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission," natural gas companies are prohibited from maintaining "any unreasonable difference in *rates*, charges, service, *facilities*, or in any other respect, either as between localities or as between classes of service." 15 U.S.C. § 717c(b) (emphasis added). Gathering, which is not "transportation or sale of natural gas subject to the jurisdiction

of the Commission," is not subject to Section 4(b) with respect to either rates or facilities.[5]

Judicial precedent also treats rates and facilities consistently for jurisdictional purposes. This Court has found "no conflict in the directives of the two sections [Section 4 and Section 7][6]. Indeed, they supplement one another and thereby work together in efficient conjunction to carry out the purposes of the Act." *Federal Power Comm'n v. Hunt*, 376 U.S. 515, 523 (1964). *See also Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Comm'n*, 905 F.2d 446, 449 (D.C. Cir. 1988). Similarly, the lack of a distinction between rates and facilities was implicit in the question presented in *Northwest Pipeline Corp. v. Federal Energy Regulatory Comm'n*, 905 F.2d 1403 (10th Cir. 1990). In the orders under review in that case, the "threshold issue [was] whether the Commission has jurisdiction over Northwest's *facilities* and has the authority to determine the level of the *rates* charged by Northwest." *Northwest Pipeline Corp.*, 38 F.E.R.C. ¶ 61,302, at 61,981 (1987). (emphasis added). *See infra*, Part III.

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[5] While the court below states that jurisdiction over gathering rates is "necessary to preserve the Commission's §§ 4 and 5 responsibility to prevent discrimination against shippers who must depend on monopolistic pipelines for transportation" (App. 25a), the provision of the NGA which prohibits certain types of discrimination (*i.e.*, Section 4(b)) expressly limits such prohibition to "any transportation or sale of natural gas subject to the jurisdiction of the Commission," and omits the "in connection with" language so crucial to the opinion below. *See infra*, Part IV.

[6] Section 7 (15 U.S.C. § 717f) confers authority to certificate facilities for jurisdictional activities.

This Court has stated, "Sections 4, 5 and 7 do not concern the producing or gathering of natural gas; rather they have reference to the interstate sale and transportation of gas and are so limited by their express terms." *Panhandle Eastern, supra*, 337 U.S. at 508. This Court has thus recognized that the Commission lacks jurisdiction over gathering "rates" pursuant to Sections 4 and 5, as well as over gathering "facilities" pursuant to Section 7. *See* Pet. at 7-9.

The court below asserts that the "in connection with" language indicates that Congress "foresaw the Commission's need for the ability to regulate other aspects of the natural gas industry" besides interstate transportation and sales for resale. (App. 26a, 27a). Such Congressional foresight is not evident in the explicit language of Sections 1(b), 4, and 5. Furthermore, the court below made such assertion without any reference to the legislative history of the NGA, although this Court has frequently referred to the legislative history in construing the NGA.

To INGAA's knowledge, the legislative history contains no statement reflecting a Congressional intent that the words "in connection with" are to be construed so as to negate the exclusion of gathering in Section 1(b). To the contrary, Congress clearly intended that the affirmative grants of jurisdiction over interstate transportation and sales would not confer any jurisdiction over gathering. *See supra*, testimony of FPC Solicitor DeVane; *Panhandle Eastern, supra*, 337 U.S. at 504-505; *Colorado Interstate Co. v. Federal Power Comm'n*, 324 U.S. 581, 602-03 (1945).

The court below itself recognizes its negation of Section 1(b) in the way it frames the question presented to it:

> May the Commission, under the NGA's §§4 and 5, regulate rates charged for gathering on the pipeline's own gathering facilities in connection with jurisdictional transportation, *notwithstanding* the explicit §1(b) exclusion of gathering from the act?

(App. 17a) (emphasis added). By answering this question in the affirmative, the court below subsumes gathering within jurisdictional transportation. This is evident from its assertion that any difference between gathering charges and transportation rates "doesn't matter" for purposes of determining the Commission's rate-regulatory jurisdiction under the NGA. (App. 26a). This Court, however, has always distinguished between gathering and jurisdictional activities, and has never construed any part of the NGA (including the "in connection with" language of Sections 4 and 5) to negate the explicit exclusion contained in Section 1(b). *See Hope Natural Gas, supra*, 320 U.S. 591; *Interstate Natural Gas Co. v. Federal Power Comm'n*, 331 U.S. 682 (1947); *Colorado Interstate Gas, supra*, 324 U.S. 581.

The court below relies heavily on *Colorado Interstate*, as did the Commission. Their reliance on *Colorado Interstate* is misplaced, and it misconstrues the holding in that case. The lower court claims that this Court in *Colorado Interstate* affirmed an extension of Commission jurisdiction that includes "regulation of *rates* for gathering performed in connection with interstate sales. . . ." (App. 18a) (emphasis added). This Court did no such thing. *See* Pet. at 14-18. In *Colorado Interstate*, this Court held that the Commission may, consistently with Section 1(b), ascertain gathering expenses included in the sale for resale rate:

"We only decide that [Section 1(b)] does not preclude the Commission from reflecting the production and gathering facilities of a natural-gas company in the rate base and determining the expenses incident thereto for the purposes of determining the reasonableness of rates subject to its jurisdiction." *Id.* at 603. In so holding, this Court affirmed the Commission's power to consider the costs of gathering facilities and operations that are included in the jurisdictional sales rate that is subject to its rate-regulatory authority. This ruling, however, did not extend the Commission's jurisdiction. This Court carefully recognized the distinction created by Congress between gathering and jurisdictional sales. It did not hold, as the court below contends, that the Commission has the authority to exercise "control of rates for gathering." (App. 18a) (emphasis added).

In his concurring opinion in *Colorado Interstate*, Mr. Justice Jackson clearly and succinctly described the scope of this Court's 5-4 ruling, stating:

> It is true that the Act excludes "production or gathering of natural gas" from jurisdiction of the Commission. If the Commission had imposed any direct regulation upon that activity, I would join in holding it to have exceeded its jurisdiction. But the orders in question have no immediate "impact" upon production or gathering of gas.
>
> The statute commands the Commission to regulate the price of natural gas transported and sold at wholesale in interstate commerce for resale. The Commission has investigated the fiscal aspects of production and gathering

> because of their bearing on the reasonableness of interstate rates. I suppose a commission is free to take evidence as to conditions and events quite *beyond its regulatory jurisdiction* where they are thought to affect the cost of that whose price it is directed to determine. This, as I see it, is all that has been done here.

Id. at 609 (emphasis added).

As recognized by Justice Jackson, this Court held that the Commission can consider conditions and events beyond its regulatory jurisdiction in computing a pipeline's jurisdictional rates. This Court did not hold that the Commission has jurisdiction over nonjurisdictional activities which impact on jurisdictional matters. Thus, as a consequence of *Colorado Interstate*, the Commission was empowered to collect evidence regarding gathering costs included in jurisdictional sales rates. This has been the practice of the Commission for the last forty-six years. At no time, until now, has the Commission sought to regulate gathering rates. In contrast, the opinion below would empower the Commission to require interstate pipelines to file a rate for gathering service, so that a "just and reasonable" rate could be determined for such nonjurisdictional service.

The court below claims that its holding is consistent with *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), in which this Court held that "sales in interstate commerce for resale by producers to interstate pipeline companies do not come within the 'production or gathering' exemption." *Phillips*, 347 U.S. at 680-81 (citing *Interstate, supra*).

According to the court below, in both *Phillips* and *Interstate*, "the granted power was held not to be subordinate to the exclusion." (App. 24a). However, the court below claims that the rate-regulatory authority over gathering which it discovers in Sections 4 and 5 is a "granted power" which can be construed independently of, and contrary to, the exclusion of gathering in Section 1(b). Nothing in *Phillips* supports such a claim. The "granted power" in *Phillips* was "the affirmative grant of jurisdiction over . . . sales in the first clause of §1(b)." *Phillips*, 347 U.S. at 677.

In *Phillips*, this Court required that the Commission exercise its rate-regulatory authority under Sections 4 and 5 within the boundaries defined by one of the affirmative grants of jurisdiction in Section 1(b). In contrast, the decision by the court below sanctions an exercise of regulatory power that is completely unmoored from the jurisdictional provisions of Section 1(b). As noted by the court below, this Court has stated that " '[e]xceptions to the primary grant of jurisdiction in the section [1(b)] are to be strictly construed' so that the broad purposes of the Act will not be compromised." (App. 17a) (footnote omitted). The opinion of the court below, however, cannot be understood as a strict construction of the gathering exclusion enacted by Congress. Rather, it constitutes an expansion of jurisdiction into a new area, gathering, in direct conflict with the explicit exclusion of that area from Commission jurisdiction by Section 1(b). In effect, the court below has attempted to redraw the boundaries which only Congress may draw.

III. THE DECISION OF THE EIGHTH CIRCUIT IS IN CONFLICT WITH A DECISION OF THE TENTH CIRCUIT.

In *Northwest Pipeline Co. v. Federal Energy Regulatory Comm'n*, 905 F.2d 1403, 1411 (1990), the United States Court of Appeals for the Tenth Circuit held that the Commission "failed to provide a reasoned explanation for classifying [Northwest Pipeline Company's gathering] lines as jurisdictional" and thus subject to the Commission's ratemaking authority. It reversed the Commission and remanded the case for a determination as to whether the facilities at issue are gathering facilities and therefore exempted from the Commission's jurisdiction under Section 1(b). *Id.* at 1412-1413. In so doing, the court held that "the facilities [at issue] are either gathering and exempt from jurisdiction or transportation and subject to jurisdiction." *Id.* at 1412.

The Eighth Circuit's assertion to the contrary notwithstanding, the "theory of [its] decision" is in direct conflict with that of the Tenth Circuit. (App. 26a).

In *Northwest*, the Commission, as here, attempted to assert jurisdiction over the gathering service of an interstate pipeline in a rate proceeding involving the pipeline's rates for transportation and sales in interstate commerce. As here, the Commission in the Tenth Circuit asserted that its action is "an essential facet to the expanded regulatory role Congress intended in the agency's oversight of national energy production," citing Order 436,[7] which imposes open access trans-

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[7] Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 436, 50 Fed. Reg. 42,408 (Oct. 18, 1985), F.E.R.C. Stats. & Regs., Regulations Preambles, 1982-1985,

portation conditions on pipelines and establishes a policy of fostering competitive market forces. *Northwest* at 1406. The Tenth Circuit rejected this contention, while the court below accepted essentially the same argument *in toto*.

The Eighth Circuit fully embraced the Commission's contention that its new open access statement of policy in Order 436 and the changes it had made to "facilitate competition in the market for natural gas" (App. 5a) had "given rise to questions regarding the distinction between gathering and interstate transportation and the regulation thereof under the provisions of the NGA." (App. 6a). The court below framed the question before it in this manner:

> The question is whether the Federal Energy Regulatory Commission (FERC) may, in implementing its Open Access Order No. 436, regulate the rates that natural gas pipeline companies charge third-party interstate transportation shippers for moving natural gas on gathering facilities owned by the pipeline.

(App. 2a-3a) (footnotes omitted). The court answered in the affirmative, concluding that to do otherwise would defeat "the Commission's purpose in promulgating Order No. 436, and is contrary to the purposes and explicit provisions of the NGA and the pro-competitive goals of the NGPA." (App. 20a, 29a).

The Tenth Circuit took the opposite view, citing this Court's opinion in *Colorado Interstate* for the

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¶ 30,665 (1985) (codified as amended in scattered sections of 18 C.F.R. Parts 2, 157, 284, 375, and 381). *See* App. 2a n.1.

proposition that " 'under section 1(b) the Commission does not have express or implied rate-regulatory jurisdiction of the production and gathering of gas.' " *Id.* at 1406. Its decision proceeds on the basis that Congress meant what it said and, consequently, if a particular facility performs gathering, it is exempt from Commission jurisdiction and only Congress can decree otherwise. Unlike the case below, the Commission in *Northwest* initially embarked on an analysis using its so-called "primary function" test to determine whether Northwest's lines were gathering and thus exempt from federal regulation or transportation subject to the Commission's jurisdiction. While the Commission found it unnecessary to make a determination with respect to Northern's lines (App. 53a-55a), the paths taken by the Commission in the two cases are parallel. The "test" it applied in *Northwest* did not adhere to the traditional criteria as set forth in its landmark opinion in *Farmland Industries, Inc.*, 23 F.E.R.C. ¶ 61,295 (1985). Instead, the Commission asserted that despite any possible showing under *Farmland* that the facilities might perform gathering, the Commission nonetheless would deem them jurisdictional because of the alleged primary transportation function, *i.e.*, ultimately the facilities are owned by and eventually connected to a company which has as its primary function the interstate transportation of gas. *Northwest* at 1410. In short, even if performing traditional gathering functions, Northwest's gathering lines would be deemed to be jurisdictional. *Id.* at 1408.

The Tenth Circuit concluded that the Commission "improperly applied its own test" to Northwest's gathering facilities and, by taking Northwest's status

as an interstate pipeline subject to its jurisdiction as one factor in its analysis, it "in fact subsumed the primary function analysis within that factor." *Id.* at 1410. The court noted further that the Commission had based its position on the policies adopted in Order No. 436, and that the "questions in this case are submerged in the broad policy discussions about the need for national supervision of energy policy." *Id.* at 1407, n.11, 1411.[8]

The *Northwest* court rejected all of these arguments. Citing Section 1(b)'s clear distinction between transportation in interstate commerce and gathering activities, the court concluded that "the movement of gas alone from the wellhead cannot transform the services into interstate transportation," and that the Commission "failed to provide a reasoned explanation for classifying these lines as jurisdictional." *Id.* at 1411. The Tenth Circuit held that "[t]he gathering exemption was not meant to attach only to certain owners/operators but to facilities." *Id.* "[T]he result [of its test] must still be based on the calculation of these [primary function] factors in this adjudication, not the Commission's perception of national regulatory policy. Indeed, although FERC may construct sound policy in this case, we do not believe it satisfies its own precedent or the intent of Congress." *Id.*

In sharp contrast, the Eighth Circuit swept aside the statutory limitations of Section 1(b) and relied on

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[8] The court quoted the Commission's Brief which stated that " '[w]hat is at stake in this proceeding is the Commission's ability to carryout (sic) its statutory mandate by fostering wellhead competition in a national commodity market through an open, unified natural gas transportation network.' " *Id.* at 1411, n. 21 (parenthetical in original).

the Commission's statement of policy as set forth in Order No. 436. Under the Eighth Circuit's analysis, gathering is subject to Commission jurisdiction because it is conducted by an interstate pipeline. The Tenth Circuit, as noted above, took a directly opposite position. With regard to Order No. 436, the *Northwest* court clearly held that Section 1(b) is the controlling consideration, "not the Commission's perception of national regulatory policy." *Id.* As stated by the Tenth Circuit:

> Thus, although FERC's power to regulate may extend to the limits of its statutory jurisdiction, the "express jurisdictional limitation on FERC's powers contained in § 1(b) of the NGA," *Northwest Central Pipeline*, 109 S. Ct at 1274, cannot be recast or obscured in the agency's attempt to formulate policy to protect the public interest and burner-tip consumer. Unless Congress removes existing limitations on FERC's jurisdiction, the Agency's perception of national policy cannot establish or alter that jurisdiction which Congress has expressly granted. *See FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 636, 92 S.Ct. 1827, 1836, 32 L.Ed.2d 369 (1972).

Id. at 1407 (footnote omitted).

The Eighth Circuit contended there was no conflict between the Tenth Circuit's opinion and "the theory of our decision" (App. 26a), because the *Northwest* court simply reversed and remanded as a result of the Commission's failure to apply its own "primary function test," and so declined to address the Com-

mission's Sections 4 and 5 argument, which of course, the Eighth Circuit embraced as its own. (App. 26a).

The Eighth Circuit reads too much into the Tenth Circuit's decision not to consider the Commission's "alternate" Sections 4 and 5 argument. What is plain from the Tenth Circuit's decision is that it did not just "simply" reverse and remand, it thoroughly explored and decided the primary issue of the statutory limitations on the Commission's powers under Section 1(b). It required the Commission to adhere to the statutory mandate of Section 1(b) that gathering is exempt from Commission jurisdiction. It did not accept the Commission's contention, made also to the Eighth Circuit, that the overriding consideration was not the function of the nature of the line but whether it was a facility owned and operated by an interstate pipeline. It further rejected the position of the Commission that gathering by an interstate pipeline is governed, not by the proscriptions of Section 1(b), but by the consideration of the broad open access policy promulgated in Order No. 436. The whole thrust of the Tenth Circuit's decision, therefore, is directly at odds with the "theory" of the Eighth Circuit's decision, which was guided by the Commission's asserted need to regulate pipeline gathering rates to foster the policy goals of Order No. 436. The fact that the Tenth Circuit decided not to address the Sections 4 and 5 argument is incidental to and does not in any way change the central legal premise of that court's opinion.

There is a basic conflict between the Circuits which this Court should review.

IV. THE OPINION BELOW ENCROACHES ON THE POWER OF CONGRESS TO DETERMINE THE SCOPE OF FEDERAL AUTHORITY OVER NATURAL-GAS COMPANIES.

According to the court below, jurisdictional rates for transportation in interstate commerce can be "manipulate[d]" by interstate pipelines, unless the Commission is allowed to regulate the gathering rates charged by such pipelines. The court below claims that unregulated "manipulation" of gathering rates would be contrary to the intent of Congress to protect third-party shippers, and by extension, "[t]he public, the ultimate consumer." (App. 19a-20a).

The court below errs in two respects. First, the comprehensive, public-interest scheme of consumer protection which was enacted by Congress consists of both state and federal regulation, "and the critical inquiry is whether Congress intended state or federal authority to govern." *Federal Power Comm'n v. Transcontinental Gas Corp.*, 365 U.S. 1, 27 (1961). The intent of Congress with respect to gathering is clear: "effective public control" over gathering and production is entrusted to the states, and not to the federal government. *Interstate, supra*, 331 U.S. at 690.[9]

Second, the court below errs in suggesting that gathering is somehow tantamount to jurisdictional

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[9] *See also* H.R. Rep. No. 709, 75th Cong., 1st Sess. 2 (the NGA "takes no authority from State commissions. . . ."). In Order No. 436, the Commission noted that recent state legislation had offered purchasers of natural gas "increased flexibility and a real ability to purchase competitive gas supplies where interstate transportation is available." Order No. 436, *supra*, F.E.R.C. Stats. & Regs., Regulations Preambles, 1982-1985, at 31,487.

transportation when the interstate pipeline is the owner/operator of the gathering facilities:

> Permitting a pipeline to manipulate the otherwise unregulated charges for gathering services performed over its own facilities in connection with jurisdictional interstate transportation, would, in effect, permit the *pipeline* to establish rates for the interstate transportation.

(App. 19a) (emphasis in original). Section 1(b) creates no distinction among natural-gas companies which perform gathering services. It explicitly excludes gathering from Commission control, regardless of whether the owner/operator is an interstate pipeline or some other entity, such as a producer. The analysis of the court below ignores this clear line drawn by Congress. It would expand the meaning of "transportation in interstate commerce" beyond what Congress intended, thereby eliminating the explicit exclusion for gathering.

Moreover, the assertion of regulatory necessity is unsupported as a factual matter. The court below claims that:

> the Commission has by its orders and regulations demonstrated that 'in connection with' interstate transportation, regulation of the charges made by the pipeline for gathering over its own facilities is essential to prevent discrimination against third-party gas in interstate transportation and sales.

(App. 25a). While the court below does not cite any orders or regulations in the above passage, it apparently is claiming that a necessity for Commission ju-

risdiction over gathering was "demonstrated" in Order No. 436 and in the "open-access" regulations promulgated therein. If so, the court below is in error. In Order No. 436, the Commission emphasized that it "has no choice in the matter; we are required to live within the letter and spirit of both the NGA and NGPA as Congress has directed, and we must reconcile the two in changing circumstances—in times of surplus as well as times of shortage."[10] Consistent with this necessary concession to the statutory limitations on its jurisdiction, the Commission in Order No. 436 did not assert rate-regulatory jurisdiction over gathering, but simply required pipelines to "identify" gathering costs (18 C.F.R. §284.7(d)(1)), and confined its non-discriminatory, rate-regulatory provisions to matters within the purview of its jurisdiction over transportation in interstate commerce.[11]

In today's competitive market where transportation of gas for others is the dominant source of revenues for pipelines, throughput must be maximized. This is a fundamental characteristic of open-access. As a result, the assertion of the court below that pipelines providing gathering services are discriminating against third party shippers is simply not consistent with reality.

The court below attempts to redefine the scope of the Commission's jurisdiction. However, "a *need* for federal regulation does not establish [Commission] jurisdiction that Congress has not granted." *Federal*

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[10] Order No. 436, *supra*, F.E.R.C. Stats. & Regs., Regulations Preambles, 1982-1985, at 31,487 (footnote omitted).

[11] *Id.* at 31,494.

Power Comm'n v. Louisiana Power & Light Co., 406 U.S. 621, 635-36 (1972) (emphasis in original).

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition, INGAA respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

JOHN H. CHEATHAM, III*
JEAN E. SONNEMAN
555 13th Street, N.W.
Suite 300 West
Washington, D.C. 20004
(202) 626-3200

Attorneys for Interstate Natural Gas Association of America

**Counsel of Record*

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APPENDIX

APPENDIX A

MEMBER COMPANIES OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

AlaTenn Resources, Inc.
Alberta Natural Gas Company Ltd.
American Oil and Gas Corporation
Arkla Pipeline Group
Blue Dolphin Pipeline Company
The Coastal Corporation
Columbia Gas Transmission Corporation
Consolidated Natural Gas Company
Delhi Gas Pipeline Corporation
El Paso Natural Gas Company
Enron Corp.
Equitrans
Foothills Pipe Lines (Yukon) Ltd.
Granite State Gas Transmission Inc.
Great Lakes Gas Transmission Company
KN Energy, Inc.
Lone Star Gas Company
Michigan Gas Storage Company
MidCon Corp.
National Fuel Gas Supply Corporation
Northern Border Pipeline Company
Pacific Gas Transmission Company
Pacific Interstate Company
Panhandle Eastern Corporation
Public Service Company of Colorado
Questar Pipeline Company
Sonat Inc.
Tenneco Gas
TransCanada PipeLines
Transco Gas Company
United Gas Pipe Line Company
Valero Interstate Transmission Company

Valley Gas Transmission, Inc.
Westcoast Energy Inc.
The Williams Companies, Inc.
Williston Basin Interstate Pipeline Company
Wintershall Corporation